Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies Concerning	)	MM Docket No. 01-317
Multiple Ownership of Radio Broadcast	)	
Stations in Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

To: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC.

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EXECUTIVE SUMMARY

The National Association of Black Owned Broadcasters, Inc. ("NABOB") has a substantial interest in this proceeding. The number of minority owners of radio broadcast facilities has decreased by 14% since the passage of the Telecommunications Act of 1996, which permitted major consolidation of ownership of radio broadcast stations into the hands of a few large corporations. The Commission has recognized in the Notice of Proposed Rulemaking in this proceeding, that it has a statutory obligation to promote diversity of ownership of broadcast facilities. Minority ownership has always been recognized by the Commission as a component of diversity of ownership. Therefore, NABOB requests that the Commission adopt promotion of minority ownership of radio facilities as a primary policy objective in this proceeding. NABOB requests that the Commission take the following actions to promote diversity of ownership and minority ownership:

1. The Commission should place greater emphasis on the promotion of diversity of ownership, and with it the promotion of minority ownership, in the radio industry.
2. As a part of its public interest review, the Commission should assess the impact on minority ownership of assignment and transfer applications.
3. The Commission should eliminate its policy of granting 6, 12 ad 18 month waivers of the radio ownership rules to allow parties exceeding the rules to find potential buyers. Applications to sell stations to third party buyers should be filed at the time assignment and transfer applications which exceed the limits are filed.
4. The Commission should make permanent, with the revisions proposed in these Comments, the Commission's Interim Policy for processing assignment and transfer

applications. In particular the Commission should consider a 40/60 market share screen for "flagging" potential excessive consolidation in a market, instead of the current 50/70 screen.

5. The Commission should change its radio market definition to correlate with the Arbitron market.

6. The Commission should treat all Local Marketing Agreements as attributable interests.

7. The Commission should continue to urge Congress to reinstate the minority tax certificate policy.

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The National Association of Black Owned Broadcasters, Inc. ("NABOB"), by its attorneys, hereby submits its Comments in the above-captioned proceeding.[1] In this proceeding the Commission seeks "to examine the effect that [radio] consolidation has had on the public and to consider possible changes to [the Commission's] local radio ownership rules and policies to reflect the current radio marketplace." NPRM at para. 1. NABOB supports the Commission's decision to examine its radio ownership rules at this time. NABOB submits that such a review should result in the adoption by the Commission of specific policies to promote minority ownership of broadcast facilities. In support of its position, NABOB submits these Comments.

NABOB is the trade association representing the interests of the African American owners of radio and televison stations and cable television systems across the United States. Founded in

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[1] In The Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MM Docket No. 01-317, MM Docket No. 00-244, FCC 01-329, released Nov. 9, 2001 ("NPRM").

1976 and incorporated in 1977, NABOB has been an active participant in Commission rulemaking proceedings for over 25 years. Throughout its existence, NABOB has helped the Commission to establish policies to promote minority ownership in the broadcast industry. The number of African American owners of broadcast stations has dropped significantly since the passage of the Telecommunications Act of 1996. This loss of African American owners robs the American public of the diversity of broadcast voices the Commission has consistently acknowledged to be necessary to preserve our First Amendment rights and protections. Thus, NABOB has a substantial interest in this proceeding.

I. SUMMARY

NABOB submits that the Commission should adopt promotion of minority ownership of radio facilities as a primary policy objective in this proceeding. The Commission has long recognized that promotion of minority ownership is an important part of the diversity of ownership objective of its radio ownership rules. Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC 2d 979, 982 (1978). A recent study conducted for the Commission demonstrates that minority radio station owners provide diverse programming.[2] However, two additional studies conducted for the Commission have shown that the effects of current and past discrimination by fianancial institutions and advertisers continue to act as barriers to entry and growth for minority

[2]Diversity of Programming in the Broadcast Spectrum: Is there a Link between Owner Race or Ethnicity and News and Public Affairs Programming?, Christine Bachen, et al., December, 1999 at 37. (Incorporated herein by reference.)

entrepreneurs and existing owners.[3] While recent court decisions may have limited the Commission's discretion in devising programs to promote minority ownership, the Commission has continued to recognize the public interest benefit in promoting minority ownership. In its report to Congress on barriers to entry, the Commission recommended to Congress that it consider reinstatement of the tax certificate program.[4] NABOB submits that the Commission should continue to encourage reinstatement of the tax certificate program.

Since the enactment of the Telecommunications Act of 1996, the number of minority owners in the radio industry has decreased. The study prepared by Mr. Kofi A. Ofori titled "Radio Local Market Consolidation & Minority Ownership ("Ofori Study"), submitted as an attachment to the comments of the Minority Media Telecommunications Council in their Comments in this proceeding, demonstrates that the number of minority owners has decreased from 173 in 1995 to 149 in 2001. Ofori Study at 1. (Incorporated herein by reference.) The study demonstrates that, without specific Commission action to promote minority ownership, the number of minority owners will continue to decline. Ofori Study at 1-3, 25-26.

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[3] "Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present," by Ivy Planning Group LLC, December 2000 at 11; Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes, by William D. Bradford, Ph.D., December, 2000 at 27. (Incorporated herein by reference).

[4] Section 257 Report to Congress: Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses, 15 FCC Rcd 15376, 15445, par. 84 (2000).

The Ofori Study confirms that the negative effects of consolidation that have already occurred, have occurred with the Commission's 50/70 screen to "flag" market over-consolidation in place. The Ofori Study provides data which leads to the conclusion that the 50/70 screen is too loose. The Ofori Study data would support a 40/60 screen, instead of the current 50/70 screen. Specifically, the Ofori Study demonstrates that:

1. During 1996 and 2000, a single owner controlled an average of 44% and 45%, respectively, of the advertising revenues in the Arbitron markets.
2. For Arbitron markets 101 through 150, the single largest firm controlled an average of 47% and 48% of advertising revenues for the years 1996 and 2000, respectively.
3. The two largest firms in each of the Arbitron markets controlled an average of 70% of the revenue share in 1996, and 74% of the revenue share in 2000.
4. For markets 200 and above, the two largest firms controlled an average of 77% of the revenue share in 1996 and 87% of the revenue share in 2000. Ofori Study at 5-7.

The Ofori Study concludes that:

> The data show that according to two measures — the 25% audience cap and the 50/70 screen — that ownership consolidation has exceeded public interest safeguards. The data also show that the impact [of] consolidation is greater in the smaller markets where there are generally fewer stations and smaller populations.

Ofori Study at 7.

Given this negative trend, among the steps which the Commission should take to promote diversity of ownership and minority ownership are the following:

1. The Commission should place greater emphasis on the promotion of diversity of ownership, and with it the promotion of minority ownership, in the radio industry.

2. As a part of its public interest review, the Commission should assess the impact on minority ownership of assignment and transfer applications.

3. The Commission should eliminate its policy of granting 6, 12 and 18 month waivers of the radio ownership rules to allow parties exceeding the rules to find potential buyers. Applications to sell stations to third party buyers should be filed simultaneously with the underlying assignment and transfer applications.

4. The Commission should make permanent, with the revisions proposed in these Comments, the Commission's Interim Policy for processing assignment and transfer applications. In particular, the Commission should consider a 40/60 market share screen for "flagging" potential excessive consolidation in a market instead of the current 50/70 screen.

5. The Commission should change its radio market definition to correlate with the Arbitron market.

6. The Commission should treat all Local Marketing Agreements as attributable interests.

7. The Commission should continue to urge Congress to reinstate the minority tax certificate policy.

II. CONSOLIDATION IN THE RADIO INDUSTRY HAS HAD A NEGATIVE IMPACT UPON DIVERSITY AND MINORITY OWNERSHIP IN THE BROADCAST INDUSTRY

In the Notice of Proposed Rulemaking ("NPRM") in this proceeding, the Commission recognized that "diversity is one of the guiding principles of the Commission's local ownership

rule." NPRM at para. 29. The diversity principle is intended to advance the purpose of the First Amendment, which, as the Supreme Court stated, "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." NPRM at para. 29 citing Associated Press v. United States, 326 U.S. 1, 20 (1995). The Commission noted in the NPRM that the Commission has historically evaluated three aspects of diversity: viewpoint diversity, outlet diversity, and source diversity. NPRM at para. 30. The Commission seeks comment in this proceeding on which of these three types of diversity should guide the Commission's public interest consideration. Id.

NABOB submits that the Commission should promote those aspects of diversity which will lead to ownership of radio facilities by a diverse set of owners, particularly minority owners. This requires that the Commission promote viewpoint diversity and source diversity. Specifically, the Commission should seek diversity among owners, because owners have the ultimate control over the programing that is broadcast over the airwaves.[5]

It is only through ownership diversity that the Commission can work to ensure that there will be "less chance [that] a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level." NPRM at para. 29 (citing Amendment of Sections 73.35, 73.24, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Report and Order, 45 FCC 1476, 1477 (para. 3).

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[5]The Supreme Court of the U.S. has, in fact, determined that the preservation of media diversity is a government interest that is not only important, but of the highest order. See Turner Broadcasting System v. FCC, 512 U.S. 622, 663 (1997); see also Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 190 (1997).

Only ownership diversity can provide the type of meaningful diversity that will promote the First Amendment policies of the Commission. A single entity owning stations broadcasting in a variety of entertainment formats does not provide the type of diversity that the Commission's ownership rules are designed to promote. The ownership rules are primarily intended to promote opinion diversity, and only secondarily entertainment diversity. The local ownership rule is intended to ensure that one person or entity does not have an inordinate ability to control the free flow of ideas and to control public discourse on important issues. One owner controlling many entertainment formats is positioned to exercise exactly the inordinate control over public discourse the local ownership rule is designed to prevent. Thus, consolidation can never promote true diversity. This is true no matter how many stations are under common control in a market. Eight stations in eight different formats in one market, regardless of the specific formats, will never express opinions at odds with the views of the party controlling those eight stations. Such consolidation will always be contrary to the principle of diversity.

Thus, the Commission should proceed in its analysis of the issues in this proceeding with the objective of adopting policies which will diversify ownership of radio facilities.

III. THE COMMISSION SHOULD USE ARBITRON MARKETS TO DEFINE RADIO MARKETS

The Commission has asked whether it should revise any of its current rules to promote diversity. NPRM at para. 30. It is clear that revisions are definitely required. In particular, the Commission's method for defining radio markets for purposes of applying its local radio ownership rule is in need of revision.

The Commission asks in the NPRM whether the appropriate geographic area for measuring diversity should be coextensive with the relevant geographic market for competition purposes? NPRM at para. 33. The answer to this question is yes. The principal barrier to increased diversity of ownership by minority owners is the inability of small minority owned companies to compete with large majority owned companies. Ofori Study at 2. Thus, in this regard, the competitive and diversity objectives call for a similar policy approach.

Moreover, the appropriate geographic area which should be used for diversity and competition purposes is the Arbitron market. Arbitron markets should be used to determine whether the acquisition of a radio facility will impede increased diversity and whether it will impede competition.

The Commission explains that currently it uses a contour overlap test to define radio markets when reviewing assignment and transfer applications. NPRM at paras. 5, 7 & 44 . The Commission notes that this method of defining radio markets has been criticized for producing irrational results. NABOB fully agrees with this criticism. Radio stations compete in Arbitron markets. Arbitron audience ratings are the principal factor used by advertisers in deciding on which stations to advertise, and it is advertising revenue which ultimately determines the survival and success of a radio station. Thus, defining radio markets through the current method of reviewing contour overlaps relies upon engineering measures which frequently bear no resemblance to the true Arbitron-based world in which stations operate.

In Golden Triangle Radio, Inc., et al, FCC 02-51, released March 19, 2002, v. ("Golden Triangle"), the irrationality of application of the current contour overlap rule was graphically demonstrated. In Golden Triangle, the Commission denied a Petition to Deny filed by T&W

Communications Corporation ("T&W") against the purchase by Cumulus Licensing Corp. ("Cumulus") of seven radio stations in the Columbus-Starkville-West Point Arbitron market in Mississippi (the "Columbus-Starkville" market).[6] The Commission acknowledged that Arbitron reported 14 stations in the Columbus-Starkville metro.

As a result of the Commission's current radio market definition rule, the Commission's analysis was flawed. Having determined that the parties are competing in the Columbus-Starkville Arbitron metro, the Commission should have analyzed the question of undue concentration based upon the actual advertising market in which the stations compete. Instead, the Commission analyzed the transaction based upon its current definition of radio markets. That definition divided the Arbitron market into three separate markets. The Commission then identified the stations which purportedly operated in each of these three markets and concluded that in Market 1, Cumulus would be allowed to own 5 stations, in Market 2 Cumulus would be allowed to own 5 stations, and in Market 3 Cumulus would be allowed to own 5 stations. Thus, although Cumulus would own 7 of the 14 stations in the Arbitron metro, the Commission's radio market definition did not even consider these numbers in the computation of the number of stations Cumulus would be allowed to own. This is a clear example of a case where the application of the Commission's current market definition rule creates an irrational result. More importantly, it is a clear case of a situation where the application of the Commission's rule is negatively impacting minority ownership. The

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[6]The Golden Triangle proceeding is not yet final, and the discussion of this matter is not intended to request on behalf of T&W any relief in that proceeding. Rather, these comments are directed at seeking a change in the Commission's policies for future proceedings. It should be noted that undersigned counsel for NABOB also represents T&W in that proceeding, and the principal owner of T&W, Mr. Bennie Turner, is the President of NABOB. Thus, NABOB has a substantial interest in the Golden Triangle case.

Commission should amend the radio market definition rule so that the computation of the number of stations in a market reflects the competitive realities of the Arbitron market.

IV. THE COMMISSION SHOULD GIVE GREATER CONSIDERATION TO THE PROMOTION OF DIVERSITY AND MINORITY OWNERSHIP WHEN IT EVALUATES POTENTIAL COMPETITIVE HARM

In Golden Triangle, supra, after concluding its calculation of the number of stations in the relevant Columbus-Starkville radio market, the Commission turned to the question of potential competitive harm due to Cumulus acquiring 7 stations in a 14 station market. The Commission concluded that there was no evidence of potential competitive harm. In so holding, the Commission stated:

> 33. T&W Communications asserts that Cumulus has a strategy of "overwhelming" small competitors and thereby making supracompetitive profits. It also asserts that Cumulus is selling advertising on its stations in combination packages and is offering free spots on the station that competes with T&W Communications' station. T&W Communications asserts that Cumulus is attempting to "squeeze" other radio stations out of the market. Cumulus, on the other hand, describes its ability to offer packages of advertising as a public interest benefit and a benefit for advertisers. It states that with common operation of the stations, it is able to offer advertising packages of sufficient scope to be a desirable alternative to newspaper or television advertising, at least for some advertisers, thus facilitating greater cross-media competition.
>
> 34. Absent additional evidence in the record, we decline to find that the mere fact of offering advertising in packages, or of offering advertisers discounts for buying spots on multiple stations, is anticompetitive. Indeed, such practices may be efficient and procompetitive. As for Cumulus's statements to its shareholders that it seeks to enter midsize markets in order to earn higher than market returns, Cumulus explains in the very sentences quoted by T&W Communications that this is because many small programmers lack the capital to produce high quality locally-originated programing and employ more sophisticated research and marketing techniques, which Cumulus will be able to do. In short, Cumulus is claiming to be able to operate radio stations better than its competitors. Cumulus's superior ability to earn revenues, if it indeed has that ability, is not an anticompetitive harm that would

warrant our denying these applications.[7]

Thus, the Commission disregarded T&W's evidence concerning free advertising spots and other activities engaged in by Cumulus to squeeze small competitors out of the market. In fact, the Commission held that such conduct may be "efficient and procompetitive." This is a very troubling statement. In NABOB's view, the facts described by T&W in the Golden Triangle case appear to be a clear example of predatory pricing designed to drive a small competitor out of a market.

Small radio markets receive very little study from major research firms such as Arbitron and BIA. In fact, until Cumulus contracted with Arbitron to measure the metropolitan area, there was no Columbus-Starkville Arbitron metro. Similarly, the BIA data examined by the Commission in Golden Triangle was a special study commissioned by Cumulus for purposes of that proceeding. It would appear from the Commission's analysis in Golden Triangle that the Commission would view these new expenditures by Cumulus as being "efficient and procompetitive." However, NABOB submits that these expenditures, coupled with the evidence of predatory pricing presented by T&W, actually demonstrate that small markets across America are "ripe for the picking." The Commission's Golden Triangle decision gives a green light for large companies to purchase large clusters of stations in small markets and to use so-called "efficient and procompetitive" free and discount ad packages to drive small competitors out of these markets.

If the Commission continues with this view of competition in small markets, the Commission will do serious damage to diversity of ownership and viewpoint in small markets, and will, in the process, also do serious damage to minority ownership. The NABOB membership consists primarily of small stations and many of them are in small markets. See Ofori Study at 11-14. The

[7]Golden Triangle at par. 33-34, Footnotes omitted.

Commission should review and revise its current approach toward analyzing anticompetitive conduct so that the Commission's analysis will foster diversity of ownership, not destroy it.

V. THE COMMISSION HAS THE STATUTORY AUTHORITY AND OBLIGATION TO PROMOTE VIEWPOINT DIVERSITY, SOURCE DIVERSITY AND MINORITY OWNERSHIP IN ITS RADIO OWNERSHIP RULES

In the NPRM the Commission asks several questions concerning the relationship between its statutory obligations under Section 309(a) and Section 310(d) of the Communications Act on the one hand, and Section 202(b) of the Communications Act, on the other. Pursuant to Sections 309(a) and Section 310(d), the Commission is obligated to regulate the granting of and transfer of radio licenses "consistent with the public interest, convenience, and necessity." Section 202(b)(1), added to the Communications Act by the Telecommunications Act of 1996, requires the Commission to establish numerical guides, set forth in that section, specifying how many stations an entity may own in markets of various sizes.

The Commission sets forth in the NPRM three possible analyses of how these sections of the Communications Act are intended to work together. The third analysis, which suggests that Section 202(b) established presumptively permissible levels of radio ownership and that, therefore, the Commission should rely on that section's numerical limits "absent a specific reason to conclude that the rule is ineffective in addressing diversity and competition issues with respect to a particular proposed combination." This interpretation of the statutory scheme is the most reasonable. Throughout the history of the Communications Act, Congress has provided the Commission the discretion to interpret the Communications Act in light of each specific case before it. It is reasonable to conclude that, in adopting Section 202(b), Congress intended to provide the

Commission the discretion to balance the competing interests reflected in Sections 309(a), Section 310(d) and Section 202(b).

The Commission has stated that it has had two central public interest goals in meeting its obligation to promote the public interest under Sections 309(a) and Section 310(d): the promotion of diversity and competition. The Commission asks for comment on the contours of these public interest goals. NPRM at para. 28. As noted above, NABOB submits that the primary aspects of diversity the Commission should promote in its radio ownership rules are viewpoint diversity and source diversity. These two aspects of diversity require the Commission to promote the ownership of broadcast facilities by diverse owners, who have the potential to provide a diverse array of opinions on topics of importance to the American public. As the Commission noted in the NPRM, the Supreme Court has stated, and the Commission has consistently endorsed the principle, that the "widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." NPRM at para.29.

As long as the Commission focuses on the fundamental principle that the radio ownership rules are designed primarily to ensure to the American public "diverse and antagonistic sources" of information, the answers to many of the Commission's questions follow very clearly. One owner controlling many different entertainment formats is incapable of providing the American public "diverse and antagonistic sources of information." No matter how broad a variety of entertainment programs a single owner may provide, a single owner can never be relied upon to provide programming antagonistic to the views or interests of that owner. Moreover, only the most foolhardy of employees would routinely engage in airing programming antagonistic to the views or interests of his or her employer. Certainly, national communications policy cannot be established based upon

a hope that a group station owner will permit programming to air which is antagonistic to such owner's views and interests.

VI. THE COMMISSION SHOULD ADOPT A BRIGHT-LINE TEST TO LIMIT ADDITIONAL EXCESSIVE RADIO OWNERSHIP CONSOLIDATION

The Commission requests comment on the rules and procedures it should adopt to regulate radio ownership. NABOB submits that the Commission should adopt rules which will promote viewpoint diversity, source diversity and minority ownership, and which will prevent further excessive ownership consolidation in the radio industry. Such rules and procedures should begin with a bright-line test.

1. Owners should not be allowed to exceed the numerical ownership limits set forth in Section 202(b).

2. Owners seeking to engage in transactions which will result in combinations in excess of the limits set forth in Section 202(b) should be required to file assignment or transfer applications which will eliminate the excessive combinations simultaneously with the primary transaction. The Commission should terminate its practice of granting 6, 12 and 18 month waivers of the ownership rules to allegedly allow parties to seek out potential buyers. In the Clear Chanel-AMFM merger, the largest radio merger to date, the parties were able to file assignment and transfer applications for over 100 radio stations, with numerous buyers, including several minority owned buyers, at the time the merger application was filed. If buyers could be lined up and transactions signed prior to the filing of the Clear Channel-AMFM merger, parties

in all radio merger applications should be able to file assignment and transfer applications at the time the merger application is filed. This would eliminate the need for rule waivers. Moreover, this would subject the sale of such "spin-off" stations to scrutiny along with the merger application. Such scrutiny would allow review at that time of matters such as: (1) the seller's good faith efforts to find a buyer, (2) the possibility that the buyer chosen will increase consolidation in the market, (3) the impact of the sale on minority ownership, and (4) the potential for sales to companies which may be acting in concert with the seller (e.g., buyers who may "park" stations for the seller).

3. The Commission should replace its 50/70 screen with a 40/60 screen for all radio assignment and transfer applications.

4. The Commission should specifically examine the impact of all radio assignments and transfers on minority ownership whenever it appears that a transaction may negatively affect minority ownership.

5. The Commission should treat all local marketing agreements as attributable interests.

6. The Commission should make permanent, with the revisions proposed in these Comments, the Commission's Interim Policy for processing assignment and transfer applications.

VII. CONCLUSION

Radio industry consolidation has had a negative impact on the number of minority owners in the radio industry. The Ofori Study clearly and convincingly demonstrates this. Moreover, the

study shows that absent government intervention, this decline can be expected to continue. Minority ownership is an important part of the Commission's obligation to promote diversity of viewpoint in the broadcasting industry. NABOB submits that the Commission should implement the above-described actions and policies to promote diversity of viewpoint and minority ownership and to curtail the continuing negative effects of industry consolidation.

Respectfully submitted,

THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC.

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